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646148—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 156

FRANCIS D. HOUSTON, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. pp. 47–54) is not yet reported.

JURISDICTION

The order of the United States Court of Claims dismissing the petition was entered on January 12, 1962. A petition for rehearing, timely filed, was denied on March 7, 1962. The petition for a writ of certiorari was filed on June 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the removal of petitioner from his position as an appraisal supervisor in the Federal Hous-

ing Administration was in compliance with the applicable statutory procedures and regulations.

STATUTE INVOLVED

Section 14 of the Veterans Preference Act of June 27, 1944, 58 Stat. 390, as amended, 5 U.S.C. 863, provides:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse

decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

STATEMENT

The petitioner seeks review of an order of the Court of Claims dismissing his wrongful discharge action. The pertinent facts may be summarized as follows:

In November of 1953, petitioner, an appraiser in the Honolulu office of the Federal Housing Administration, made certain serious allegations of malfeasance by his two immediate superiors. The accusations were investigated by an inspector from the regional office. Upon receipt of the investigator's report petitioner was notified by the Director of Personnel that it was proposed that he be separated from the service because the charges he had made could not be sustained. This initial step in the separation proc-

ess was set aside by the Civil Service Commission because it was found that the letter of charges furnished petitioner lacked the requisite specificity.

On July 8, 1954, following petitioner's reinstatement, specific charges were preferred and he was advised that his removal was proposed.[1] He was informed that he would be allowed ten days from the date of the receipt of the notice to submit a reply personally and in writing.

Petitioner submitted a written reply, dated July 22, 1954, in which he restated his prior allegations, *i.e.,* maladministration on the part of the two cited officials. By letter dated August 6, 1954, petitioner was informed of the final decision of the agency to separate him from the Federal service, and was advised of his right to appeal the decision to the Branch Regional Office of the Civil Service Commission. That office, following the filing of an appeal, conducted a field investigation of the facts surrounding the dismissal, at the conclusion of which petitioner, in a sworn affidavit executed on December 21, 1954, voluntarily waived his right to an oral hearing before a Commission representative.

On March 17, 1955, a decision was rendered by the Regional Director affirming the action of the agency. Petitioner appealed this decision and requested an opportunity to appear personally before the Board of Appeals and Review. This request was denied

[1] The accusations initially made to the investigator were reiterated by the petitioner in his letter of December 29, 1953, to the Federal Housing Administrator in Washington. Both of these formed the basis of the charges preferred by the Commission.

because the record reflected that he had previously waived a hearing before the Regional Office. Petitioner was, however, afforded an opportunity to—and in fact did—submit a written memorandum.

On October 27, 1955, the Board of Appeals and Review advised petitioner that it had affirmed the decision of the Regional Office sustaining the agency's action effecting his separation for cause. From this, the final decision of the Civil Service Commission, petitioner instituted suit in the district court against the administrator alleging procedural defects in his separation. Summary judgment was entered in favor of the defendant and on appeal the Court of Appeals affirmed per curiam, stating in full, *Houston* v. *Mason, et al.*, 267 F. 2d 654, 655 (C.A.D.C.):

> Appellant, a Veterans Preference Eligible, was removed from his position as an appraiser in the Honolulu office of the Federal Housing Administration. The charges were specific and completely adequate to apprise the appellant of the nature of the proposed action. He made reply to the agency. In due course he waived a hearing. His separation from employment was affirmed by the Twelfth Civil Service Region and by the Board of Appeals and Review of the United States Civil Service Commission.
>
> In his action in the District Court challenging his removal and demanding reinstatement and other relief, summary judgment was entered for the appellees. It is clear that appellant feels that he was ill advised in waiving a hearing. There is nothing to suggest that he had in anywise been overreached, or that there has been a denial of such procedural benefits

as appellant might have been entitled to receive. [Authorities cited.] [2]

Having been unsuccessful in his attempt to secure reinstatement, petitioner instituted suit in the Court of Claims seeking monetary damages. Noting that petitioner's procedural complaints were adversely determined in the prior proceedings, that court directed its attention solely to the merits, *i.e.*, whether, in the context of the Veterans Preference Act, petitioner's discharge promoted the "efficiency of the service." [3]

After an extensive review of the facts, the Court of Claims concluded that petitioner's removal was not arbitrary or capricious and that it was appropriate for the Civil Service Commission to uphold petitioner's discharge since petitioner had been wholly unable to sustain the grave charges he had lodged against his superiors.

ARGUMENT

It is well settled that matters resulting to the discharge of federal executive employees are within the discretion of the employing agencies, and that judicial review of such matters is limited to the determination of whether the dismissal was effected in compliance with the applicable statutory and regulatory procedures. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Hofflund* v. *Seaton*, 265 F. 2d 363 (C.A.D.C.), certiorari denied, 361 U.S. 837; *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970. In

[2] "The record is not sufficiently clear to preclude a decision on the merits. Thus, we do not here dismiss." (Footnote by the court.)

[3] 58 Stat. 390, as amended, 5 U.S.C. 863, *supra*, p. 2.

petitioner's suit, the Court of Appeals for the District of Columbia Circuit held that, "There is nothing to suggest that [petitioner] had in anywise been overreached, or that there has been a denial of such procedural benefits as [petitioner] might have been entitled to receive."[1] This decision is conclusive as to the procedural regularity of petitioner's removal. The court below has also determined that petitioner's removal was not contrary to law and was not arbitrary or capricious. The petition repeats the factual contentions heretofore made in the court below, in the district court and in the court of appeals. Clearly these do not warrant further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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[1] *Houston* v. *Mason, et al.*, 267 F. 2d 654, 655.

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